JoJene Mills
LAW OFFICE OF JOJENE MILLS, P.C.
State Bar No. 010372; PC No. 64891
1670 East River Road, Suite 270
Tucson, Arizona 85718
(520) 529-3200 – Phone
jmills@jmillslaw.com

Lawrence J. Rudd, M.D., J.D.
RUDD MEDIATION
Admitted in California 150652, Pro Hac Vice in AZ#1010420
1414 Ridge Way
Pasadena, California
(626) 795-3339 – Phone
lrudd@ruddmediation.com

Arlan A. Cohen, M.D., J.D.
LAW OFFICES OF ARLAN A COHEN
Admitted in California 149200, Pro Hac Vice in AZ #1010419
1008 South Oakland Avenue
Pasadena, California 911
(626)449-9209 – Phone
arlancohen@gmail.com

Attorneys for Plaintiffs/Cross-Petitioners

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

JEREMY AND KIMBERLY HARRIS, Plaintiffs/Cross-Petitioners v. RICHARD E. GORDON, JUDGE OF THE SUPERIOR COURT OF ARIZONA, PIMA COUNTY, Respondent Judge,	No. 2CA-SA 2019-0051 Pima County Superior Court No. C20174589 **HARRIS REPLY IN SUPPORT OF CROSS PETITION FOR SPECIAL ACTION**

v.

BANNER UNIVERSITY MEDICAL CENTER TUCSON CAMPUS, LLC, an Arizona Corporation dba BANNER UNIVERSITY MEDICAL CENTER TUCSON; GEETHA GOPALAKRISHNAN, MD; MARIE L. OLSON, MD; EMILY NICOLE LAWSON, DO; DEMITRIO J. CAMARENA, MD; PRAKASH JOEL MATHEW, MD; JASON THOMAS ANDERSON, MD; SARAH MOHAMED DESOKY, MD; BANNER HEALTH; BANNER UNIVERSITY MEDICAL GROUP,

Defendants/Real Parties in Interest

The respondents do not deny the following crucial facts: the state (the University of Arizona) made a business deal with a private corporation (Banner) designed to relieve the University of 100% of responsibility and 100% of any liability risk of providing clinical medical care at the newly named "Banner-University Medical Center Tucson," also a private corporation. Banner does not dispute that the negligent physicians in this case were dual employees of the University and Banner. Banner does not dispute that while providing clinical care, they were under 100% control of Banner. Banner does not dispute that the University had no say in any way about how the care was delivered. Banner does not dispute the obvious conclusion that the *only* reason this private corporation would assume

100% of the liability risk was because they controlled every aspect of clinical care *to the exclusion* of the University. Banner does not dispute that the state has absolutely no financial risk from this case. Nevertheless, despite the private corporation (Banner) being solely responsible for all liability for negligence in this case and the state having absolutely zero responsibility, Banner-retained attorneys argue that because their physicians also had dual employment as faculty at the University, Banner may take advantage of the Notice of Claim and shortened statute of limitations that the legislature enacted to regulate *liability of the state*. Banner relies on cases that, unlike this case, do not concern dual employment and cases in which the government actually had liability risk.

The two central reasons for seeking reversal of the trial court's dismissal of the faculty physicians raise issues of first impression and of state-wide importance in Arizona. First, do A.R.S. §§12-821 and 821.1 apply when the tortious acts are committed solely within the course and scope of non-government employment in a dual employment situation? Second, do A.R.S. §§12-821 and 821.1 apply when the government has no financial exposure? The application of these two statutes to physicians at Banner University Medical Center-Tucson affects every potential cause of action arising from care at B-UMCT-T. Patients with potential cases need to know as soon as possible whether they face dramatically shortened deadlines, which justifies special action jurisdiction. In addition, in this case, if this Court reverses the trial judge's finding that Banner must still face vicarious liability for the

dismissed physicians and does NOT review whether their dismissal was correct, then this case will proceed to a truncated trial against just Dr. Hoehner and hospital employees. Perhaps those defendants will allege non-party fault against the dismissed physicians. This will be an enormous waste of time and money if the Harris family is correct that the doctors were erroneously dismissed. Special action jurisdiction is justified to avoid such a waste.

The entire foundation of the doctors' support of the trial court's summary judgment rests on only two cases, each claimed to be dispositive of one of our two assertions of error. These are *Villasenor v. Evans,* 241Ariz.300, 386P.3d1273 (App.2016), for respondents' proposition that even "incidental" government action in the course of a tort requires the application of A.R.S. §§12-821 and 821.01, regardless of overwhelming evidence that the tortious acts were under the complete control of a non-governmental corporation and *Swenson v. County of Pinal,* 243Ariz.122, 402P.3d1007 (App.2017) for their proposition that "it doesn't matter if the government entity has no financial exposure, §§12-821 and 821.01 nonetheless apply." Absent arguments based on these two cases, respondents present no reasoning of substance against Cross-Petitioners' two assertions of error.

Neither case applies on our facts.

***

***

I. THE FACULTY PHYSICIAN/DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR BANNER HEALTH EMPLOYMENT/AGENCY, WHEN THEY COMMITTED FATAL MALPRACTICE, SO THE STATUTES AT ISSUE DO NOT APPLY. THE UNIVERSITY'S JURISDICTION WAS LIMITED TO TEACHING AND RESEARCH.

A. Banner Health Exerted Such Plenary Control Over The Rendition Of Clinical Care As To Meet All Criteria For Exclusive Employment For That Care. The University Did Not Exercise Any Such Control.

The history and purpose of these two statutes was examined in *McCloud v. State, Ariz. Dept. of Pub. Safety*, 217Ariz.82,90-91,¶ 22, 170P.3d691,699-700 (App. 2007), a case in which, according to this Court, a DPS officer, driving his DPS car while looking for a restaurant, was *not* acting as a state employee. The Court noted, "Then, as now, a 'public employee' includes an 'officer, director, employee or servant, whether or not compensated or part time, *who is authorized to perform any act or service*,' § 12–820(1), of any "public entity," § 12–820(5)." 21Ariz.at 90,¶23, 170P.3dat 699.

The Banner defendants had the burden of proving that they were entitled to the benefits of A.R.S. §§12-821 and 12-821.01. *Dube v. Desai*, 218Ariz.362,366, ¶12, 186P.3d587, 591 (App. 2008). They failed to carry this burden because as the facts have shown, the University had absolutely no authority over any act or service of physicians rendering clinical care.

The whole point of this massive transaction was to privatize clinical care into the hands of a non-governmental corporation that was already in the business of

running hospitals. As the Affiliation Agreement stated up front:

> The Parties hereby agree that the Parties' Objectives are best achieved through the adoption and implementation of a consistent provider employment model for Banner Academics and single, comprehensive staffing model for the Medical Center - Tucson Campus, the Medical Center - South Campus, and BGSMC, as described in this Article 4.

(APPV1 334)[1] Therefore, the parties further agreed, in Article 4, "Physician Staffing Model and Transition,"

> 4.1 Physician Employment. B-UMG shall serve as the exclusive faculty practice plan for both Medical Schools. Specifically, the Parties shall cause all faculty physicians *employed by BH or an Affiliate of BH or by the University to provide their clinical services exclusively through B-UMG*, except as otherwise provided herein. (Emphasis added.)

(334) It is important to note that as a part of Banner's acquisition, physicians were employed by the University *only* to ensure prior pension rights, permit continued tenure at the University and to comply with pre-existing contracts regarding "titles of personnel." The reason for designating physicians as University employees "had nothing to do with their clinical responsibilities," as the post-acquisition President of Banner, Kathy Bollinger, explained. (716-718) The agreement also made clear that if a physician was terminated from B-UMG, they could continue their employment with the University "non-clinically," according to Bollinger. (714)

This question of scope of employment requires application of basic questions of agency, *McCloud*, 217Ariz.at 91,¶30,170P.3d at700. Cases that do not involve

[1] All citations to the record are to Cross-Petitioners' Appendix 6 and the "APPV1" page numbers, unless otherwise indicated.

dual employment do not deal with the careful factual determination of *which of two employers* was in control of the harmful actions at issue. Here, over and over again the acquisition documents and testimony of the former Banner CEO make clear that only B-UMG had the right to control clinical care.

In the seminal case, *Santiago v. Phoenix Newspapers, Inc.,* 164Ariz.505,509, 794P.2d138(1990), the Arizona Supreme Court identified eight elements that indicate agency. Under the *Santiago* criteria, the facts below showed Banner employment only, and no University employment, as to the rendition of clinical care. These facts are further proof that the whole point of the University's transaction with Banner was to relieve the University from delivering out clinical care and place that responsibility solely with Banner. The words "alone," "solely" or "only" below signify "without participation or input by the University." The facts cited by respondents only show dual employment. Respondents' facts do not delve further to show scope of employment or authority to act in the delivery of clinical care.

When the Cross-Petitioners' son Connor was admitted to Banner University Medical Center, he was admitted only by Banner.(810-11) Though his was an emergency admission, Banner did not accept him until his parents signed the Conditions of Admission and the Financial Agreements, documents authored solely by Banner.(810-11) The contractual arrangement for rendition of medical care and payment in return was between Banner and the Harris family alone.(810-11) Banner alone billed for services rendered by the physicians, did the collections on those bills,

and alone owned all monies collected in payment for the physicians' work.(684-5, 678-82, 966-67) The physicians, nurses, technicians who evaluated and treated Connor Harris were chosen for the family by Banner alone.

Once Connor was admitted, the provisions of the Affiliation Agreements between Banner and the University kicked in. Banner Health assumed *all* liability for conduct by the dismissed physicians while seeing patients at B-UMCT, but *only* for the rendering of clinical care, leaving teaching and research under the jurisdiction of the University.(734-35,318-19,557) Banner's CEO, alone and without meaningful chance of being overruled, determined, for each physician, if he or she was permitted to work at B-UMCT; how many hours he or she could work at B-UMCT; what specific shifts the doctor was to work; which patients the doctor could and which he could not care for.(331-333,727-28,554-55) Banner alone supplied the facility for clinical care, B-UMCT (726-27,313); all the instruments needed for rendering clinical care (727); all the ancillary equipment (x-ray machines, operating rooms, clinical laboratories, among others)(727-28) and all the ancillary personnel used by doctors in rendering clinical care (nurses, operating room techs, x-ray techs, lab techs)(728). If the CEO of B-UMG determined that a doctor was not qualified to render clinical care, acting alone he could take that doctor off the wards, require him to go to rehab, and determine when *he* felt the doctor could return to work.(331-333,554-5,803-05) Through the residents' and fellows' manual, in the section labelled "Banner University Medical Group (B-UMG) Policies"(778-787,565-589)

the doctors were instructed in *Banner's* requirements (in which the University had no say) about even how to write notes in the medical record, about the timing of medical records, how physicians were permitted to talk with patients and colleagues, when physicians might expect random drug and breath testing, what constituted Banner's definition of harassment, how Banner provided counseling services, what HIV screening and which twelve educational meetings were mandatory (a nest of rules taking up nine single-spaced pages), violation of which, determined at the sole discretion of the B-UMG CEO, subjected the physician to summary dismissal from B-UMCT. This oversight could not be avoided: membership in B-UMG and being subject to the plenary discipline and regulation of the B-UMG CEO was required for faculty appointment.(684-5,678-81)

Any physician dispute at B-UMCT, including those between faculty physicians, was to be finally resolved only by the CEO of B-UMG. (684-5;678-82) The CEO further had the right to impose productivity standards on faculty for their clinical work at B-UMCT, with sole discretion to pay faculty members, even those of identical rank, different salaries depending on the CEO's determination of their output. (565, 331-333) Banner's CEO not only could exclude any specific physician from working at B-UMCT, but Banner Health has the right to terminate residency programs at B-UMCT altogether as of March 1, 2020.(732-33)

Further erasing any doubts about who "owned" the practices of the physicians

working at B-UMCT, when Banner floated a $94.1 million bond issue, the prospectus stated that as of February, 2015 "we have acquired the practices" of the faculty physicians working at B-UMCT, effectively using their practices as collateral for the loan.(820)

Decisions by the CEO of B-UMG were technically reviewable or even reversible by an "Academic Medical Council" comprised of representatives of both Banner Health and the University. However, overruling any decision by the CEO of B-UMG required that *the Banner members of the Council* vote to overrule the *Banner CEO*. No evidence indicates that this has ever happened.(506-07,730-31,331-333)

Respondents have presented no evidence of the control of the rendition of medical care by the University to counter this mountain of evidence of Banner control. The only University task as regards regulation of clinical care at B-UMCT documented in the Affiliation Agreements is the University's obligation to direct Physicians to "meet the clinical and performance standards established by B-UMG" (554), and to "provide excellent clinical care" as their "clinical practice activities are carried on exclusively through B-UMG."(679,685-6)

B. <u>It Is Not Only Conceptually, Legally And Operationally Possible To Distinguish Government Care From Nongovernmental Care In A Single Patient, But The State And Nongovernmental Care Partners, Including B-UMG, Have Been Doing So For Decades.</u>

Defendant cites the trial court's ruling that there is "no way to separate teach-

ing residents about clinical practice from the clinical practice itself" (App.7, P.2,lines 5-6). First, we respectfully assert that the two are clearly separable and that the separation was *exactly* the point of Banner's takeover. Teaching of medical trainees occurs in the absence of rendition of clinical care; and clinical care decisions can be rendered by faculty in the absence of any trainee, and by trainees in the absence of faculty.

Second, the distinction between contractually implemented B-UMG jurisdiction over clinical care, and University jurisdiction over "academic" activity is specified both in letters offering employment (678-9) and letters sent by the University to explain post-affiliation division of authority and control.(684-85)

One logical way of dealing with the question "Are teaching and clinical care conceptually separable for the purposes of selectively ascribing legal liability?" is to ask another question: "Has this distinction in fact been made, without difficulty or dispute, by these very litigants over the years?" If so, the court's assertion that the distinction is "impossible" is disproven. That is precisely what occurred.

The exhibits to Cross-Petitioners' statement of facts (APP6) show that this distinction was made and implemented for decades, in the form of a liability-mitigating, combined University-nongovernmental liability-and-cost-allocation agreement and corporate structure set up by ABOR and the University, through which any single act of rendering clinical care by a single faculty attending was defined as "within the scope of University employment" for its teaching component,

but "within the scope of employment by the outside, nongovernmental entity (first UPI/UPH, later B-UMG) for the clinical care given.(977, 684-85, 678-82, 826-29, 572-651)

Since 1996, ABOR and the University of Arizona College of Medicine required, as a condition of faculty appointment, membership in a non-governmental outside corporation, UPI/UPH and its successors. The nature and purpose of these "outside-the-University" corporations are revealed in the trial court holding in the Pima County case of *Alsobrooks v. Anton.* (826-29) This is not cited as precedent, but to show the undisputed factual nature of the relationship between the government entity and the nongovernmental entity, demonstrating the ease with which the two entities classified a single type of act, "treating patients in the presence of trainees," *not* as something "impossible to dissect as regards scope of employment" but quite the opposite: as something easily and cleanly divided by function, action, and purpose. The faculty employment offer cited in the *Alsobrooks* denial of summary judgment (sought on the same grounds invoked by Respondents here) stated the following:

> "If you are providing clinical care to patients, you also will have concurrent membership and employment with UPI, our clinical practice organization. *You will be an employee of the Arizona Board of Regents in your teaching, service and research capacities, and an employee of UPI for the delivery of health care…."* (Emphasis added).(827)

The Alsobrooks opinion also noted:

> The agreement between UMC and UPH provides that clinical services are essential to the curriculum of the College of Medicine and to ensure clinical staffing by physicians who are both employees of the Board in their teaching and research capacities and employees of UPH in their delivery of health care, and they are employees of the Board *only* in their teaching and research activities. (Emphasis added.)(828)

This nongovernmental corporation, UPI/UPH, which according to the University "became B-UMG" upon affiliation, like B-UMG bought malpractice insurance for claims regarding clinical care (and only clinical care), did the billings and collections for physician care rendered; then sent that money to the University so that the paychecks could bear the University logo, even though the payment explicitly for patient care rendered, was solely for acts within the scope of UPI employment.

This discrete, explicit separation of teaching from rendition of clinical care in determining which employer was legally responsible for misconduct continued through multiple later documents as well. Banner's exclusive responsibility for liability for clinical care rendered, and *only* for clinical care rendered, with explicit exclusion of responsibility for teaching, is set out in Cross-Petitioners' summary judgment exhibits (684-5,678-82,655,657-674, and all of SOF Ex. 7 and 8, the Affiliation Agreements): letters sent to faculty defendants describing the terms of the Banner takeover; letters offering terms of employment after the takeover (678-82,684-5); the several affiliation agreements themselves detailing the plenary Banner control over the rendition of medical care at B-UMCT leaving teaching and research to the University; Banner's blanket malpractice policy only for clinical

care; the Purchase of Services Agreement by which Banner hired the physician defendants and paid hourly wages for their work; and defendants' responses to RFAs.

The trial court questioned whether the distinctions between employment for teaching and employment for giving clinical care set forth in *Alsobrooks* were still in effect in 2015. Respondents cited as dispositive one sentence in a Terms of Employment letter regarding Affiliation to claim an alteration in that relationship, the cited phrase stating, "The University will be your sole employer as to both your clinical practice and your academic activities." (App7, Ex. J, p.2) However, that letter and others to faculty physicians (684-5) also states "You will continue to carry on your clinical practices exclusively through UPH (which will then be known as B-UMG) but will do so as an employee of the University;" that "You will adhere to B-UMG's bylaws, policies, performance standards and procedures;" that "you will report….with respect to your clinical practice activities ultimately to the CEO of B-UMG;" and, by contrast, that "The terms and conditions associated with your *academic* (teaching and research) activities will continue to be governed by your prior University Offer letter."

The Supreme Court, in *Santiago,* is clear: it is the *actuality* of control, not what the parties state in documents or even believe, that controls the determination of employment. *Beeck v. Tucson Gen. Hosp.,* 18Ariz.App.165,171, 500P.2d1153,1159(1972), review denied ("unless the radiologist were actually an

independent contractor the clause reciting him to be so is of no effect"), *citing* 6A.L.R.3d704(1966), as supplemented (1971). The Terms of Employment letters confirm the continuing explicit separation of authority to control clinical practice activities, which belongs to B-UMG, from authority to control academic activities (teaching and research), which belongs to the University, even within the single act of rendering care in the presence of a trainee. The trial court, as ABOR has done for decades, should have been able to make this distinction, which places the negligent acts at issue in this case within the course and scope of Banner employment.

C. *Villasenor v. Evans,* the Sole Case Cited by Respondents, is Inapplicable to the Facts of Our Case.

Respondents' solitary case-based argument depends solely on *Villasenor v. Evans,* 241Ariz.300, 366 P3d1273 (App.2016). Respondents urge the Court to focus exclusively on that Court's assertion that Evans' work, being "at a minimum incidental to her work as a Councilmember and Vice Mayor" required application of the subject statutes to our case. Respondents want this Court to "universalize" that holding so as to apply it where the issue is "under the control of which of two dual employers was the tortious performed" as it is in our case, rather than "was the tortious act personal or governmental" as it was in *Villasenor*.

The facts of the two cases differed massively. In *Villasenor,* no evidence was admitted that concurrent membership in a neighborhood home-owners association was in any manner related to the conduct of Evans at issue in the case. The central

and dispositive *Villasenor* finding is the heading of section II: "VILLASENOR FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER EVANS ACTED WITHIN THE SCOPE OF HER PUBLIC EMPLOYMENT." (Id, ¶15) The holding was based on an intensely evidence-based analysis of two factual issues: 1) how Evans' actions were congruent with her established governmental duties, and 2) how those actions were *not* consistent with any *proven* obligations to the home-owners association. Villasenor never asserted evidence of "second employer" control. 241Ariz. at 303,¶16, 386P.3d at 1276.

We submit that the *Villasenor* court, using the same fact-intensive analysis on *our* facts would likely not have brought the concept of "incidental" government action into play, and that the *Villasenor* holding itself is appropriate only on its own specific facts, for four reasons. First, the factual context of *Villasenor* is absent in our case. The citing of "incidental" government involvement in *Villasenor* came about not because there was a dispute about which of two employers controlled the defendant's tortious actions, but because there was an issue of whether the defendant's actions could be called governmental at all, within the meaning of §§12-821 and 921.01.

Second, evidence in our case of an overweening, controlling, second, non-governmental employer, Banner, and therefore that the rendition of clinical care resulting in Connor Harris' death fell clearly within the ambit of Banner control, would have been dispositive.

Third, as the University did for twenty years, and as Banner and the University did in their Letters and Affiliation Agreements, the Court would have been required to distinguish employment by the University for teaching and research from employment by the nongovernmental corporation, now B-UMG, for rendition of clinical care.

Fourth, the *Villasenor* Court reasonably felt that Villasenor's argument that the City did not pay for Evans' defense was sufficiently material in determining under whose employment Evans' tortious acts fell that he gave it specific mention in the opinion. That argument failed only when Evans produced evidence that the City *had* paid for her defense (Id.¶5-6). In our case, by contrast, the cost of defense has been borne by Banner alone, with no government contribution.

Villesenor is distinguishable because there was no evidence of dual employment and because there was no question that the government entity had financial risk. This apparently justified stretching the definition of "public employee" to actions that were just "incidental." That acts are "incidental" to employment would never justify finding a principle/agent relationship, where no right of control, etc. is shown. "Incidental" should not be the determining standard in a case like this, where there is no government exposure. The situation is like that in *Young v. Environmental Air Products et al.,* 136Ariz.158, 665P.2d40 (1983), in which the Arizona Supreme Court approved of different ways of determining "employment" depending on the circumstances of the case.

> We agree with the court of appeals that the legislative objectives are furthered if the statute [defining "statutory employer'] is liberally interpreted when imposing liability for payment of compensation benefits…and strictly interpreted when loss of the worker's common law rights is the object for which the statute is invoked….(Citations omitted.)

Young 136Ariz. at 163, 665P.2d45 (1983). Similarly, here, the determination of "public employee" should not turn on whether the act was "incidental" when there is no government exposure and no government authority over the acts.

Ultimately, the appellate decision on this issue, where the statutes on their face do not address our facts, turns on interpretation of legislative intent. *Villasenor,* 241Ariz. at 303, ¶14, 386P.3d at1276. Government interests were balanced against the interests of injured citizens in the promulgation of §§821 and 821.01. Torts issuing from acts and omissions during the execution of the tasks of government employment trigger the statutes. Torts issuing from acts and omissions during the execution of nongovernment employment do not. Applying the *Villasenor* citation to "incidental" government employment universally, particularly where there is dual employment and evidence that the causative component of the tortious act was under non-governmental control, creates new law.

This Court must decide whether the intent of the legislature was so to limit the rights of harmed families that their ability to seek compensation is restricted even when the acts or omissions related to government "employment," in this case teaching, is causally unrelated in any plausible manner to the harm that occurred in

the course of rendering of clinical care, which was fully under the control and supervision only by Banner.

II. A.R.S. §§12-821 AND 12-821.01 DO NOT APPLY WHERE NO GOVERNMENTAL FINANCIAL EXPOSURE EXISTS.

A. Applying These Statutes In The Absence Of Government Financial Exposure Is Unjustified By Their Legislative Intent, And Would Permit Limited, Purpose-Driven Statutes To Be Used By Selective Private Corporations For Purposes Unintended By The Legislature, Giving Those Corporations Unfair Economic Advantages.

Respondents do not challenge the basic premise that a statute must be interpreted and applied to carry out the legislative intent on which it is based. *McCloud v. State, Ariz. Dept. of Pub. Safety*, 217Ariz.82,90,¶ 22, 170P.3d691, 699 (App. 2007)("[T]o interpret § 12–821 to apply to claims against a public employee who was not acting in the scope of his or her employment at the time of the actionable event would be contrary to the legislature's intent and inconsistent with the interpretation of related statutes"). This is the standard by which the appellate court must determine if there was reversible error by the trial court. The central question is whether or not application of the statutes at issue implemented or went materially beyond legislative intent, thereby creating new law where that privilege belongs to the legislature.

Respondents also do not dispute, as set out in the three Arizona Supreme Court and twelve Arizona Appellate cases (see Cross Petition, pp. 12-13), that the legislative intent of A.R.S. §§12-821 and 12-821.01 is, purely and entirely, to protect

the financial interests of the State, specifically to allow an early evaluation of liability and the possibility of settlement, so as to permit the State to budget for and cover potential State liability.

There is no factual basis for an argument that the physician defendants in this case, "the government" for the purpose of analyzing this issue, had *any* actual or potential financial liability to evaluate, settle or budget for. The evidence set forth initially in plaintiffs' summary judgment papers establish that beginning July 1, 2015, almost four months *before* Connor Harris' treatment and death at B-UMCT, actual or potential liability accruing to any governmental entity for malpractice related to clinical care rendered by faculty physicians at B-UMCT, including these physician defendants, was *permanently extinguished*. Respondents admitted this in a Request for Admissions. (655, 657-674, 291-294, 318-19, 557)

The financial benefit from application of these statutes would accrue *only* to Banner Health, a self-insured, non-governmental entity. As Respondents stated, "No one is arguing that the Tort Claims Act should apply to private corporations like Banner Health." (Response to Cross Petition p.16, ll.13-14). Yet, that's exactly what they're trying to accomplish.

Rather, the Arizona Legislature determined that the appropriate balance between permitting plaintiffs sufficient time to become aware of harm from medical malpractice and to take action on that awareness, on the one hand, and the health care providers' rights to "peace and final resolution of potential liability" on the

other, was a two-year statute of limitations. Part of the reasoning for allowing two years for filing was the understanding that in the face of serious harm, individuals of ordinary intelligence and alertness might not be able to come to grips with tragedy in a timely enough fashion sufficiently even to question how the tragedy came about, much less to understand that medical malpractice was the cause, and to be able to get sufficient information to find legal representation in a lesser period of time. A.R.S. §§12-821 and 12-821.01 are *limited* exceptions to this balance of rights, by which the right of patients harmed by malpractice to seek fair compensation was materially diminished for a specific "greater good": the need for government to soundly manage its finances.

The application of 180-day claim and one-year filing requirements to Banner-employed and Banner-insured physicians would award Banner Health an economic and legal advantage and a material diminution of accountability for tortious conduct that no other private actors have. Moreover, expanding the protections given to nongovernmental employers further diminishes the protections given by civil law to injured patients. Such a change should come only from the legislature.

To overcome the substantial case law and evidentiary support for Cross-Petitioners' arguments. Respondents would have had to proffer conflicting case law, showing the legal basis for permitting the trial court to disregard and go beyond established legislative intent, i.e. to apply §§821 and 821.01 even where there was zero financial exposure for the government. Respondents' response on this point is

limited to a single paragraph and a single case citation, *Swenson v. County of Pinal,* 243Ariz.122, 402P.3d1007 (App.2017), asserting that Cross-Petitioners' argument that the statutes do not apply in the absence of government financial exposure was "soundly rejected in *Swenson."* (p. 15 line 9-16 line 1). Not so.

B. <u>The *Swenson* Case Fails To Address The Principle That Statutes Must Be Applied So As To Carry Out Legislative Intent. Further, Since Its Facts Do Not Include "Absence Of Any Government Financial Exposure," The Issue Respondents Posit That This Case "Soundly Rejected " Is Never Even Addressed.</u>

Swenson did not address the applicability of §§12-821 and 821.01 in the absence of government exposure, because in that case, there *was* government exposure, dealt with by the government through the purchase of insurance. In *Swenson* the plaintiff claimed that since the government covered its potential liability by purchasing insurance, it no longer had to "budget," so the statutes at issue did not apply. 243Ariz.at124,¶3, 402P.3d at1009. The court recognized that insurance was just one of several ways of government dealing with its own liability and therefore, the statutes applied. *Id.* at¶15. What happens absent financial exposure was never discussed.

Cross-Petitioners' position is that court rulings should implement a statute's legislative intent and *only* legislative intent. Anything further should be left to the legislature. If the government has to pay for the evaluation, settlement, budgeting for, and/or defense of a case against itself or its employee, that case falls within the legislative intent of §§821 and 821.01 and they apply. If none of the stated purposes

of these statutes is advanced by application of the statutes, because there is no government liability to deal with, then application of the statutes is foreign to and inconsistent with legislative intent, brings about a massive extension of §§821 and 821.01 immunity so as to benefit selected private, nongovernmental corporations at the expense of patient rights and in that circumstance, the statutes should not apply.

III. GIVEN THE SHARP DISPARITY IN FACTS ASSERTED BY THE TWO SIDES, THE AGENCY/EMPLOYMENT ISSUES ARE OBLIGATORY JURY ISSUES.

The Court may determine agency issues if and only if the parties agree on all the operative facts. (*Ruesga v. Kindred Nursing Centers, LLC,* 215Ariz.589, ¶21,161P.3d1253 (App.2008). Regarding whose scope of employment the defendant physicians were acting within when providing care to Connor Harris, the defendants have offered no evidence that shows, in any way, that the University had any right to control the defendant physicians' actions in the rendition of clinical care, while the plaintiffs have provided ample evidence that the "Affiliation" was intentionally structured to give the non-government entity, Banner, absolute control over the physicians when they were providing clinical care. As we have stated, why else would Banner accept 100% liability risk? The trial court erred in denying petitioners' motion for summary judgment. At a minimum, petitioners presented a jury question

***

***

over whose scope of employment applied to the defendant physicians, and summary judgment was inappropriate and should be reversed.

RESPECTFULLY SUBMITTED this 10th day of January, 2020.

LAW OFFICE OF JOJENE MILLS, P.C.

By: /s/ JoJene Mills

JoJene Mills
1670 East River Road, Suite 270
Tucson, Arizona 85718

Arlan Cohen, M.D., J.D.
LAW OFFICES OF ARLAN A COHEN
1008 South Oakland Avenue
Pasadena, California 911

Lawrence J. Rudd, M.D., J.D.
RUDD MEDIATION
1414 Ridge Way
Pasadena, California

Attorneys for Plaintiffs/Cross-Petitioners

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the attached Reply uses type of at least 14 points, is double-spaced, and contains 5,239 words. The Reply does not exceed the 5,250 word limit set by Rule 7(e), R.P.S.A.

/s/ JoJene Mills

CERTIFICATE OF SERVICE

JoJene Mills, being first duly sworn, upon oath states that on the 10th day of January, 2020, she caused the original of the Reply in Support of Cross Petition for Special Action to be electronically filed with the Arizona Court of Appeals Division Two website and sent via e-mailing and mailing, via First Class Mail to:

Honorable Richard E. Gordon
Judge of the Superior Court Pima
County Superior Court
110 W. Congress Street
Tucson, AZ 85701
mdimond@sc.pima.gov
Respondent Judge

Eileen Dennis GilBride
JONES, SKELTON & HOCHULI, P.L.C.
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
egilbride@jshfirm.com
Attorney for Defendants/Petitioners

GinaMarie Slattery
SLATTERY PETERSEN PLLC
5981 East Grant Road, Suite 101
Tucson, Arizona 85712
gslattery@slatterypetersen.com
Attorney for Defendants/Petitioners

Kathleen Rogers
SLUTES SAKRISON & ROGERS PC
4801 E Broadway Blvd Ste 301
Tucson, AZ 85711-3635
krogers@sluteslaw.com
Attorneys for Co-Defendants Jeff C. Hoehner and Arizona Pediatric Surgery and Urology, Ltd.

/s/ JoJene Mills